

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

1730 K STREET NW, 6TH FLOOR
WASHINGTON, D.C. 20006

April 29, 2002

RODNEY WOODRUFF

v.

HOLLINGER CONSTRUCTION

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Docket No. WEST 2002-163-D

BEFORE: Verheggen, Chairman; Jordan and Beatty, Commissioners

ORDER

BY: Verheggen, Chairman; Jordan and Beatty, Commissioners

This discrimination proceeding arises under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (1994) ("Mine Act"). On March 26, 2002, Chief Administrative Law Judge David F. Barbour issued an Order of Dismissal¹ dismissing this discrimination proceeding because Rodney Woodruff failed to respond to a show cause order the judge issued on February 20, 2002. Woodruff allegedly failed to provide the judge with proof of his service to the operator of his discrimination complaint, as required in the show cause order.

On April 4, 2002, the Commission received from Woodruff a request to vacate the judge's dismissal order. Mot. In his request, Woodruff contends that he responded to the show cause order by sending the judge the return receipt card showing that he had notified the operator of his discrimination complaint. *Id.* Woodruff attached two copies of the return receipt card to his request. *Id.*, attachment. He maintains that the return receipt card he sent in response to the show cause order was either lost in the mail or was misplaced after delivery at the Commission. *Id.*

¹ On April 17, 2002, the judge issued a Corrected Order of Dismissal amending a minor clerical error in the original dismissal order.

The judge's jurisdiction in this matter terminated when his decision was issued on March 26, 2002. 29 C.F.R. § 2700.69(b). Relief from a judge's decision may be sought by filing a petition for discretionary review within 30 days of its issuance. 30 U.S.C. § 823(d)(2); 29 C.F.R. § 2700.70(a). We deem Woodruff's request to be a timely filed petition for discretionary review, which we grant. *See, e.g., Middle States Res., Inc.*, 10 FMSHRC 1130 (Sept. 1988).

We have observed that default is a harsh remedy and that, if the defaulting party can make a showing of adequate or good cause for a failure to respond to an order, the failure may be excused and proceedings on the merits permitted. *Mohave Concrete & Materials, Inc.*, 8 FMSHRC 1646, 1647 (Nov. 1986). On the basis of the present record, however, we are unable to evaluate the merits of Woodruff's position. In particular, we note that, although Woodruff attached to his request copies of the return receipt card showing that he had notified the operator of his discrimination complaint, he did not provide any documentary support for his assertion that he mailed the return receipt card to the Commission in response to the show cause order. Accordingly, in the interest of justice, we vacate the dismissal order and remand this matter to the judge, who shall determine whether relief from dismissal is warranted. *See Dunkard Mining Co.*, 17 FMSHRC 497, 497-98 (Apr. 1995) (vacating default order and remanding to judge where operator alleged that it responded to show cause order but its response was not received by Commission). If the judge determines that relief is appropriate, the case shall proceed pursuant to the Mine Act and the Commission's Procedural Rules, 29 C.F.R. Part 2700.

Theodore F. Verheggen, Chairman

Mary Lu Jordan, Commissioner

Robert H. Beatty, Jr., Commissioner

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